BEFORE THE TENNESSEE STATE BOARD OF EDUCATION

IN THE MATTER OF:	)	
[redacted]	)	
Petitioner,	)	
vs.	)	No. 99-54
MEMPHIS CITY SCHOOLS,	)	
Respondent.	)	

FINAL ORDER

William Jay Reynolds
Administrative Law Judge
611 Court Street
Savannah, Tennessee 38372

Attorney for Child:
Rebecca Adleman
26 North Second St.
Memphis, Tennessee 38103

Attorney for School District:
Ernest Kelly, Jr.
81 Monroe Ave
Memphis, Tennessee 38103

[To protect the confidentiality of the minor student, [redacted], will be referred to as "A." on all remaining pages of this decision]

I. PROCEDURAL HISTORY

A DUE PROCESS HEARING having been requested by the parent and submitted to the agency which received the request on August 26, 1999. The State Department of Education on receipt of the request appointed the Administrative Law Judge who received same on 01 September 1999.

A hearing was conducted in Memphis, Tennessee, on September 27, 28 & 29, 1999. Petitioner was represented by Ms. Rebecca Adelman, Attorney at Law. Respondent was represented by Mr. Ernest G. Kelly, Jr., Attorney at Law. The Administrative Law Judge has carefully considered the testimony, all of the documents identified in the record as exhibits, and all the arguments presented. Upon review of said evidence, testimony, and arguments the undersigned finds the following:

II. ISSUES

1. Were the assessments requested by the IEP Team done in a timely fashion? If not, were the Petitioner's procedural rights violated? If a procedural violation occurred did the Petitioner have a right to an independent educational evaluation?

2. Did Memphis City Schools provide a Free Appropriate Public Education to the Petitioner during the time period in question?

III. FINDINGS OF FACT

A. is a 20 year old student in the Memphis City School system attending Shrine School. A. was born 2 1/2 months prematurely with Cerebral Palsy and congenital bilateral transradial limb loss. When he was 13 years old, the parents learned that he had a cerebral injury. (TR. 1.

pp. 30-1) A. does not wear a prosthesis, as he has more freedom of movement without one A. is dependent with most of his daily living activities. He began at Shrine School when he was 6 years old. (TR. 1, pp. 30-34 and p. 120) He is mobile by wheelchair and has been certified as "child with a disability" under both State and Federal laws relating to special education.

On June 30, 1995, an integrated assessment report was completed by the Memphis City Schools Mental Health Center under the supervisor of Dr. Carolyn Morris Allen. The report was prepared after an assessment of A. and an interview with his parents on May 22, 1995. A treatment plan dated April 26, 1995 identifies A. as having a learning disability in reading and mathematics. School officials made repeated efforts to share the 1995 evaluation with the parent and that these efforts ended when Petitioner failed to keep her specific appointment. (Tr. 3 pp. 556-7, 575) The school district's proof showed the identical diagnosis had appeared in a 1992 assessment which was given to the Petitioner. (TR. 3, p. 587, Exhibit 21) There are no consequences on the issue of whether Petitioner was specifically aware of the specific disability. It was shown that Petitioner was at all times aware that A. was functioning below grade level in language and math where the disability was diagnosed. It was shown, without rebuttal, that the IEP goals in A's language and math goal sheets were appropriate for his disability. (TR. 3, pp. 651-2)

A. as a student at Shrine School has made substantial progress during his years at the school. Report cards and IEPs demonstrate that A. has benefited from his educational experience. Specifically, Mrs. Betty Pulley's is found to be fully credible and her testimony was convincing that A. made progress in as a student in her Math class. Mrs. Pulley also testified as to the successful use of assistive technology such as the Intelli-Keys and computers as well as the appropriate social experiences, which A. has had. Mrs. Pulley's testimony was the only witness

presented by either party who had observed A. in a classroom on an extensive basis. She was well-qualified in both subject matter and special education, inasmuch as she holds a bachelor's degree in special education and a master's in mathematics. (TR. 3, p. 596) During the most recent school year, she had been instructional facilitator at Shrine School and was therefore in a position to observe A's various departmentalized classes. She had chaired the May, 1999 IEP Team Meeting. (TR. 3. pp. 597-8) In the previous school year, she had been A's math teacher. (TR. 3. p. 599) Mrs. Pulley had attempted in her math teaching to prepare A. to take the T-Cap Test. This had proved unsuccessful, but her uncontroverted testimony was that A. had learned a significant amount of math even though he had fallen below the T-Cap level. Petitioners did not present any testimony to the contrary that A. has not made progress while at Shrine.

All of the above is sufficient evidence to determine that a free appropriate public education was being provided A. accompanied by significant and meaningful progress. Parents attempted to deny that FAPE was provided but did not present a single witness who has actually been involved with A's classroom program.

On May 30, 1994 A's individual transition plan was developed with two transition plan goals. The plan has been updated periodically and additional goals were added in 1997. When viewed in its entirety, the Transition Goal sheet, Memphis City Schools form for transition plans and other portions of the IEP which govern a transition plan, the entire IEP plan represents a transition plan to assist A. to move from school to community and/or work. The school district produced from its special education record the IEP documents for the last five years. These documents were reviewed at the hearing by the Respondent's employee, Steve Raney, who, in addition to having a license to practice law, is highly trained in special education law and regulations both by professional experience and by educational qualifications. He holds a

bachelor's degree in education and history from David Lipscomb University, a master's degree in administration and supervision from Tennessee State University and a doctorate of jurisprudence. He has formerly been employed by the State of Tennessee Department of Education for compliance and has extensive experience in reviewing IEPs. He still works with the State of Tennessee on special education issues and is currently working on a revision of state regulations. He is a nationally known speaker on the subject of special education, has taught numerous courses in special education and is working toward a doctorate in that field. (TR. 3, p. 668-71, Exhibit 24) Mr. Raney, who chaired the May 12, 1999 IEP Team meeting testified without contradiction that the IEP developed at that meeting was sufficient to begin meaningful instruction for the 1999-2000 school year. It contained measurable goals and permitted instruction to go forward. (TR. 3, pp. 676-7)

In reviewing the individual transition plan, which had originated on May 30, 1994 when A. was fourteen (14) (Exhibit 1, pp. 76-9), Mr. Raney testified without contradiction that the transition plan documents "go completely beyond requirements."

At the May 12, 1999 IEP Team Meeting, it was determined that specialists would conduct individual assessments in the areas of hearing, vision classroom observation, academic achievement, social history, assistive technology, psychological, occupational therapy, physical therapy, vocational assessment and emotional/behavioral assessment. (Exhibit 1, p. 3)

The minutes of the IEP Team Meeting of May 12, 1999 reflect the parent's preference that the assessments be conducted before the end of the 1998-1999 school year and that the assistive technology evaluation be conducted at the University of Memphis. (Exhibit 1, p 87) From school officials at the IEP Team meeting and their testimony, supported by the language of the May 12th minutes, the Petitioner's desire to have the additional assessments completed

during the summer months was a request only. Neither school officials nor the IEP Team agreed that such a request by the parents could feasibly be met or that it would be. (TR. 3, p. 678 and Exhibit 1, p. 87)

The 1999-2000 IEP, and accompanying minutes developed by the IEP-Team on May 12,1999 are replete with references to the recommended assessments, demonstrating a clear intent on the part of the IEP Team to revise the IEP based upon recommendations of the various assessors. (Exhibit 1, pp. 81-98) Prior to the end of the school year, the school conducted a psychological assessment for A. pursuant to the May 12, 1999 IEP Team Meeting. At that time, the school year was down to its last few weeks, and no specific time for the assessments was required. It was also clear to everyone that no further IEP Team meeting should take place until the assessments were conducted. This would mean that any further meeting would be conducted during the 1999-2000 school year, in light of vacation schedules and the unavailability of key employees during much of the summer. A compliant IEP was developed at the May 12, 1999 IEP Team Meeting and thus the school district was in compliance when school began.

A. was evaluated by the district at Shrine School on May 25, 26, 27 and June 2, 1999 for his psychological report. A. was also observed in one of his classrooms on May 19, 1999. The district conducted an interview with the mother of A. and his sister on July 21, 1999. The report was signed on August 24, 1999. (Exhibit 11)

On June 10, 1999 a letter was sent to the school district's counsel from the Plaintiff's counsel requesting the evaluations still outstanding must be completed immediately. If the school district did not proceed immediately, the Plaintiff's counsel would advise her clients to proceed with the evaluations. (Exhibit 2) The Plaintiff's counsel advised their clients to begin "self help". The "self help" that counsel for the parents urged was to arrange for appropriate

evaluations through agencies and professionals of their choice. (Exhibit 2) Through a series of letters from school officials and from Plaintiff's attorneys, the Court concludes that the parents were determined to use their own evaluators and school evaluators regardless of the time line. (See Testimony of mother regarding letter from Dennis Haslip regarding assistive technology assessment, TR. 1. pp. 66-71)

During this time frame when the mother received no immediate contact from the school system, she sought out Mrs. Karen Anderson about the assistive technology assessment. The parents requested that the assistive technology assessment by conducted at the University of Memphis because it was near their home and also requested that it be done by Ms. Anderson.

The parents arranged for assessments and completed the assistive technology assessment with the report rendered. (Exhibit 16 and Exhibit 1, pp. 5-26) Further, the parents began the occupational therapy assessment with Ms. Sandy Fletchall who made some recommendations and an outline of her activities with A. (Exhibit 12) The parents also arranged for a vocational rehabilitation assessment. (Exhibit 13)

The "self help" evaluations engaged in by the parents of A. and A., himself, all may very well be reports that may be helpful to a future IEP Team meeting. But the evaluations all constitute instances of Independent Educational Evaluations under IDEA. And as such, the school district is well within their right and responsibility to conduct an evaluation first. The Petitioners have failed to provide Memphis City Schools a reasonable opportunity to proceed with the evaluations recommended at the May 12, 1999 IEP Team Meeting. A period of 6 weeks in a summer when school was not in session and when a valid IEP was in place for the Fall term, certainly do not constitute a violation of any timeline under IDEA. The delay of evaluations generated a good deal of mutual frustration among all concerned and the scheduling disputes that

did occur have not had an impact on A's actual classroom situation. Irregularities in communication appear to be explained away by simultaneous tort claim creating adverse positions between the parties requiring communications between "attorneys only."

The underlying fact is that A. began the 1999 school year with an appropriate IEP document, which is enabling him to receive FAPE.

The child's progress appears to be inconvenienced but not damaged by the apparent acrimony between parties involved. The parents of A. hired their attorneys in February, 1999 after A's December, 1998 to pursue a personal injury claim for injuries sustained at Shrine School. The adverse posture of the parties results in communication errors that appear to have created this misunderstanding. The school system deserves heavy criticism for not immediately performing the assessments and/or not communicating with the parents. The school system's "lack of school personnel for testing" argument aggravates the circumstances. Petitioners, however, have consistently recognized that completion of the requested assessment should precede the reconvening of an IEP Team. This fact is documented in both Petitioner's testimony and in her attorney's correspondence (TR. 1, p. 109, Exhibit 5)

The Hoyer Lift and the training of school personnel is a non issue. Petitioner admitted that the matter had to her knowledge ceased to be a problem prior to the hearing. (TR. 1, p., 115.)

IV. CONCLUSIONS OF LAW AND DISCUSSION

This State has related its intent to require school districts to provide, as an integral part of free public education, special education services sufficient to meet the needs and maximize the capabilities of disabled children. (Tennessee Code Annotated 49-10-101) A child who has a disability is defined as a child between the ages of four and twenty-one years, inclusive, who has

been certified under the regulations of the State Board of Education. [Tennessee Code Annotated section 49-10-102 (1) (A)]

Tennessee does not include the word "appropriate" within the preamble of intent to its special education statutes. The legislators describe their intent, however, as that "sufficient to meet the needs and maximize." The idea of "appropriateness" in this State has become a blend of interpretation of both federal and state mandates. The trial judge is required to measure the factual situation of a disabled child and the educational program to accommodate his disability against a legal standard of appropriateness. Clevenger vs. Oak Ridge School Board, 744 F. 2d 514 (6th Cir. 1984)

The purpose of IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. [20 USC 1400 (1) (A) (Supp. 1998)] A disabled child's right to a free and appropriate public education is assured by the development and implementation of an IEP. see Honig v. Doe, 484 U. S. 305, 311-312. The "centerpiece" of this "free appropriate public education" is the individualized education program ("IEP") which is a collaboratively developed plan for a disabled child's education. See Reusch v. Fountain, 872 F. Supp. 1421, 1426 (D. Md. 1994). A disabled child's parents must be included as part of the team that develops and reviews a child's IEP. See 20 U.S.C. 1414(d)(1)(B)(i). "The IEP is suppose to be the joint product of discussions among the child's parents, teachers, and local school officials and must specify goals and short terms objectives for the child, any related services, and the criteria and evaluation procedures that will be used." Sanger v. Montgomery County Bd. of Educ. 916 F. Supp. 518, 519 (D. Md. 1996). An IEP must contain both a statement of the child's "present levels of educational performance and a "statement of the special education and

related services and supplementary aids and services to be provided to the child. " 20 U.S.C. 1414(d)(A)(i) and (iii). IEPs must be revised "not less than annually." 20 U.S.C. 1414(d)(4)(A)(i).

The Individuals with Disabilities Education Act (IDEA) defines free appropriate public education as: special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state education agency, (C) include an appropriate preschool elementary, or secondary school education in the state involved, and (D) are provided inconformity with the individualized education program required under section 1414 (a) (5) of the Act.

In Board of Education v. Rowley, 458 U.S. 176 (1982), it was clearly established that the IEP according to law must be individualized to meet the unique educational needs of the child. The IEP is the primary vehicle through which disabled children are assured a free appropriate public education. In 20 U.S.C. 1401 (18) we are specifically informed that the IEP should include the following: (A) a statement of present levels of educational performance of such child, (B) a statement of annual goals, including short term instructional objectives, (C) a statement of the specific educational services to be provided in regular education programs, (D) the projected date for initiation and anticipated duration of such services and (E) appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis, whether instructional objectives are being achieved.

Rowley also instructs us, "the primary responsibility for formulating the education to be accorded a disabled child, and for choosing the education methods most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." In these types of cases, the Supreme Court in Rowley (at 192),

established that the individualized educational program must be "reasonably calculated" for the child to "receive educational benefits." The United States Supreme Court in Rowley established that the individualized educational plan must be "reasonably calculated" for the child to "receive educational benefits". The student's IEP has been appropriately drafted and implemented as written with parent input for the years in question.

The United States Supreme Court has held that in order to satisfy its duty to provide a free appropriate public education , a state must provide "personalized instruction with sufficient services to permit the child to benefit educationally from that instruction." Rowley at 203. The holistic impression from the testimony of parties, witness and the record was that the school district has provided FAPE to A.

It is also well settled law that although an appropriate education must confer more than a trivial benefit (Polk v. Sesquehanna Intermediate Unit 16, 853 F. 2d 171 (3rd Cir. 1988). it is not required to maximize the child's potential. (Doe v. Board of Education, 9 F. 3d 455 (6th Cir. 1993). In evaluating a special education program, and the IEP's supporting it, a court does not require the best possible educational program. As held in Thomas v. Cincinnati Board of Education, 17 EHLR 113(6th Cir. 1999). the basic question is "whether the IEP will enable [the student] to benefit." From the record, it is obvious that the IEP written for 1999-2000 more than meets the federal and state requirements for a compliant IEP. The IEP was developed with the assistance of parents, teachers, school administrators and Petitioner's attorneys.

Turning to the request for an Independent Educational Evaluation ("self help"), the school district agreed to a number of evaluations for A. Petitioners haste for "self help" denied the school district the opportunity to complete the identified evaluations. By the very nature of an Independent Educational Evaluation, the school district has the right and responsibility to

complete its evaluation before the parent may request an Independent Education Evaluation. (TRRMS 0520-1-3-. 09) The Petitioner's reasoning in the Post Trial Brief skews legally accepted procedure. In fact, at least one evaluation was begun before the end of school. From the record, it appears other evaluations were scheduled when school staff would be available. However, the Petitioner created a crisis situation by demanding that the evaluations must be completed before the beginning of school. If the evaluations were completed during the summer then the IEP team would not have been able to convene until the beginning of the school year. As required under both federal and state law, an IEP must be in place at the beginning of the school year. The IEP developed at the May 12, 1999 IEP Team meeting was valid and was implemented on the first day of school. The student was not deprived of services due to the evaluation schedule set by the school district. No harm was committed by the summer delay of the school district. While the Petitioner may denounce the lack of specific action for the summer period on the part of the school district, those procedural infirmities do not rise to the level of a procedural violation. The student's procedural and substantive rights were not violated during the period in question.

Even if a procedural violation had been committed for lack of an IEP Team Meeting in August, it was a very minor one. The perceived procedural violation did not adversely impact the student's education or otherwise defeat the existence of FAPE. See Doe v. Defendant I, (898 Fed. 2d. 1186. 56 Ed. Law Rep. 619 (6th Cir. 1990). To say that a possible technical violation would fatally deny FAPE in this case would "exalt form over substance." See Doe v. Defendant I at 898 F. 2d at 1190.

From the school district employees and the record. A. has made more than trivial progress in his educational experience while at Shine School. As the Court in Rowley observed,

it was the intent of Congress in enacting the IDEA that disabled children would be provided a basic floor of opportunity, but beyond this Congress did not impose any particular substantive standard the states have to meet. Rowley at page 200. All that is required by the IDEA is that the education provided be sufficient to confer some educational benefit to the child. Rowley at 200-01. There is no requirement that guarantees a particular outcome for the child. See Rowley at 192. The Petitioner has failed to present any credible evidence to negate the testimony presented by the school district that the student has received a FAPE. It may be safely concluded that A. has made educational progress at Shrine and is supported by the evidence. The Petitioner attempts to show the IEP's for the last three years were not reasonably calculated to provide him with an educational benefit. However, the IEP's admitted into evidence do not support this position when taken together with all other evidence presented regarding the advancement of the student. Further, the position is weakened by the parents' satisfaction with the student's year to year educational performance until accident with the Hoyer lift.

It is easy in hindsight to find additional goals and objectives that the IEP Team did not see fit to include in their IEP. From the record it is impossible to determine if the IEP Team considered and rejected items that the parent's expert witness suggested should have been added to the IEP. In particular, nothing in the record as a whole discloses any evidence whatsoever that suggests the IEP was inadequate.

V. DECISION

The present IEP shall be updated with information from any outstanding evaluations which have been agreed to and completed but have not been discussed at an IEP Team meeting. Therefore, it is ORDERED that an IEP Team meeting is to be immediately convened.

FURTHER, the Court Further Finds that Memphis City Schools is the prevailing party for purposes of this hearing.

FURTHER, this decision herein is dispositional of all issues brought before the hearing and shall be binding on all parties unless appealed.

ANY PARTY who feels aggrieved by the finding of this decision may appeal to the Chancery Court for Davidson County, Tennessee or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty (60) days of the date of the entry of this Final Order in non-reimbursement cases and within three (3) years in cases involving reimbursement of educational costs and expenses. In appropriate cases, the reviewing court may direct this Final Order be stayed pending further hearing in this cause.

If the determination of the hearing officer is not fully complied with or implemented, the aggrieved party may enforce it by proceeding in the chancery or Circuit Court under the provisions of Tennessee Code Annotated § 49-10-601 et seq.

ENTER this the 29th day of February 2000.

William Jay Reynolds
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this Final Order was mailed on the 29th day of February, 2000, to counsel for the school system, Ernest G. Kelly, Jr. 81 Monroe Avenue, Memphis, Tennessee, counsel for the parents, Rebecca Adelman, 26 North Second Street, Memphis, Tennessee 38103, and to the Division of Special Education, State Department of Education, Nashville, Tennessee 37243-0375.

William Jay Reynolds